Spacious Glory Sdn Bhd v Coconut Three Sdn Bhd (previously known as Nexgram Land Sdn Bhd)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-28JM-12–03 OF 2020
NADZARIN WOK NORDIN JC
5 NOVEMBER 2020

Companies and Corporations — Judicial Management — Court approval — Application to appoint judicial manager — Whether applicant had locus to file application — Whether company unable to pay its debts — Whether respondent should be placed under judicial management — Whether purposes under s 405(1)(b) of the Companies Act 2016 could be achieved

There were two applications before the court, being: (a) an application by the applicant for the appointment of a judicial manager ('JM'), Mohd Afrizan ('proposed JM') to be appointed for the respondent pursuant to ss 404 and 405 of the Companies Act 2016 ('encl 1'); and (b) an application by the applicant and another being Lau Tian Kiat (Lau) for leave to continue with the proceedings against the respondent pursuant to s 410(c) of the Companies Act 2016 ('encl 14'). The grounds for encl 1 were that: (i) the applicant was a judgment creditor of the respondent for a sum of RM12.5m; (ii) a winding up petition had been presented against the respondent by Messrs Justin Faye; (iii) it was in the interest of the creditors of the respondent if a judicial management order was granted; and (iv) the creditors of the respondent would be better served if a judicial management order was granted. The grounds for encl 14 were: (A) there was a cross-appeal filed by the applicant and Lau against the respondent in the Court of Appeal ('Appeal 1622'); and (B) there was a counterclaim filed by the applicant and Lau against the respondent at the Kuala Lumpur High Court. The applicant had brought a claim against the respondent in the Kuala Lumpur High Court ('Suit 291') claiming a sum of RM12.5m pursuant to a share sale agreement which was allowed upon conclusion of a full trial. The applicant was the single largest unsecured creditor of the respondent. However, the respondent had appealed vide Appeal 1622 against the aforementioned judgment and an order for stay was granted upon the undertaking that the respondent does not dispose or transfer its single largest asset being the Nexgram Tower without the leave of court pending the disposal of Appeal 1622. On 14 December 2018, leave was granted to the respondent to dispose the Nexgram Tower at a price of RM67m and the sum of RM12.5m to be segregated from the sale proceeds to Messrs Haq & Associates Law Offices (HALO), the solicitors for the respondent ('14 December 2018 order') and the said sum was deposited on or around 15 November 2019. In February 2020, Messrs Justin Faye, the respondent's former solicitors, had filed

a winding up petition alleging that there were outstanding legal fees to be paid by the respondent which was not disputed. The applicant submitted that: (1) the respondent had vigorously opposed encl 1 but provided no sensible solution for the issues in question and that it could not be denied that the respondent had failed to appoint a solicitor to oppose the winding up petition; (2) the court should infer that the respondent intended for the company to be wound up as it has chosen not to settle the legal fees owed to MJF despite having obtained the sum of RM67m and having a surplus of RM8m; (3) the respondent had no intention to cause the payment of RM12.5m to the applicant even if Appeal 1622 was dismissed and the stay order lifted, hence amplifying the need for a judicial manager to safeguard the interest of the creditors particularly the applicant as the single largest creditor of the respondent; (4) the respondent had failed to provide an explanation as to why the interest of creditors would be better served by resorting to the winding up of the company as the judicial manager acted as an independent third party to safeguard the interest of the company and its creditors; (5) the interest of the respondent would not be prejudiced should the originating summons be granted and that opposing the application was denying the applicant of the fruits of its litigation; and (6) the court should weigh the interest of the creditors of the respondent as opposed to the respondent who had no genuine interest in the company. The issues to be determined were: (I) whether the applicant had the requisite locus standi to initiate encl 1; (II) whether the respondent company was or would be unable to pay its debts; and (III) whether the making of the order was likely to achieve one or more of the purposes stated in s 405(1)(b) of the Companies Act 2016.

Held, dismissing the applications with costs:

(1) The applicant by virtue of Suit 291 was a creditor of the respondent as not only did the respondent have a pecuniary claim against the respondent, but the respondent may or will become subject to a liability to the applicant if the Suit 291 judgment was affirmed in Appeal 1622 and therefore the applicant had locus to apply for the application for a judicial manager pursuant to s 404 of the Companies Act 2016 (see para 25).

(2) The fact that the respondent has the winding up petition filed against it was prima facie evidence of its inability to pay its debts in accordance with s 405(1)(a) of the Companies Act 2016 (see para 31).

(3) The applicant's contention that the respondent allegedly failed to provide a sensible solution for the issues in question had in fact pushed the burden of proving why the orders prayed for under encl 1 should not be given. It was not the duty of the applicant to provide a solution to the issues in question. Further, even if the respondent company was wound up, there was no bar to the applicant making a claim for the alleged debt

owed in the winding up process or that the surplus of the respondent's assets could not be dealt with by the liquidator instead of a judicial manager (see paras 33–34).

(4) The court also found that that the allegation that the respondent intended for the company to be wound up as the respondent had chosen not to settle the legal fees owed to MJF despite having obtained the sum of RM67m and having a surplus of RM8m did not satisfy any of the purposes mentioned in s 405(1)(b) of the Companies Act 2016 but was only evidence of the respondent not settling its debts. It was for the applicant to prove to the court that a more advantageous realisation of the company's assets would be effected than on a winding up and not the issue of whether the respondent intended for the company to be wound up, which was wholly immaterial. In an application for judicial management which is premised, inter alia, on the ground that a judicial management order would be more advantageous than a winding up against the respondent, as in this case, it was incumbent upon the applicant to show to this court that a more advantageous realisation of the company's assets would be effected in a judicial management order than on a winding up, which the applicant had failed to do (see para 35).

(5) The allegation that the respondent had no intention to pay the debt hence the need for a judicial manager to safeguard the interest of the creditor was amplified, was not a factor to be considered under s 405(1)(b) of the Companies Act 2016 as the said allegation did not promote or was evidence of any of the purposes mentioned therein being fulfilled (see para 36).

(6) The issue of the applicant being deprived of the fruits of its litigation or that the court should weigh the interest of the creditors was not evidence nor was the fulfilment of the survival of the company or evidence that a more advantageous realisation of the companies assets would be effected than on a winding up (see para 37).

[Bahasa Malaysia summary

Wujud dua permohonan di hadapan mahkamah iaitu: (a) permohonan dari pemohon untuk melantik seorang pengurus kehakiman (JM) Mohd Afrizan (JM yang dicadang) dilantik untuk responden selaras dengan ss 404 dan 405 Akta Syarikat 2016 ('lampiran 1'); dan (b) permohonan dari pemohon dan seorang lagi iaitu Lau Tian Kiat (Lau) untuk izin untuk meneruskan prosiding terhadap responden selaras dengan s 410(c) Akta Syarikat 2016 (lampiran 14). Alasan untuk lampiran 1 adalah: (i) pemohon merupakan pemiutang penghakiman responden untuk jumlah RM12.5j; (ii) petisyen penggulungan telah diserahkan terhadap defendan oleh Tetuan Justin Faye; (iii) ianya dalam kepentingan pemiutang responden sekiranya seorang perintah pengurus kehakiman diberikan; dan (iv) adalah lebih baik untuk pemiutang responden

A sekiranya satu perintah pengurusan penghakiman diberikan. Alasan untuk lampiran 14 adalah: (A) wujud rayuan silang yang difailkan oleh pemohon dan Lau terhadap responden di Mahkamah Rayuan (Rayuan 1622); dan (B) wujud tuntutan balas yang difailkan oleh pemohon dan Lau terhadap responden di Mahkamah Tinggi Kuala Lumpur. Pemohon telah membuat tuntutan B terhadap responden di Mahkamah Tinggi Kuala Lumpur (Guaman 291) menuntut sejumlah RM12.5 juta selaras dengan perjanjian penjualan saham yang dibenarkan setelah selesai perbicaraan penuh. Pemohon merupakan seorang pemiutang tanpa cagaran terbesar responden. Namun, responden telah merayu melalui Rayuan 1622 terhadap penghakiman tersebut dan satu C perintah penggantungan telah diberikan dengan aku janji bahawa responden tidak melupuskan atau memindah milik Nexgram Tower yang merupakan asset tunggal terbesar tanpa izin mahkamah sementara menunggu pelupusan Rayuan 1622. Pada 14 Disember 2018, izin telah diberikan untuk responden melupuskan Nexgram Tower pada harga RM67 juta dan jumlah RM12.5 juta D untuk diasingkan daripada hasil jualan kepada Tetuan Haq & Associates Law Offices (HALO), peguam responden (perintah 14 Disember 2018) dan jumlah tersebut telah didepositkan pada atau sekitar 15 November 2019. Pada Februari 2020, Tetuan Justin Faye, bekas peguam responden, telah memfailkan petisyen penggulungan mengatakan bahawa wujud yuran guaman tertunggak E yang perlu dibayar oleh responden yang mana adalah tidak dinafikan. Pemohon menghujahkan bahawa: (1) responden telah membantah lampiran 1 tetapi tidak memberikan penyelesaian yang masuk akal untuk isu yang dipertikaikan dan ianya tidak boleh dinafikan bahawa responden gagal untuk melantik peguam untuk menentang petisyen penggulungan; (2) mahkamah F harus merumuskan bahawa responden berniat untuk syarikat tersebut digulungkan kerana ianya memilih untuk tidak menyelesaikan yuran guaman yang terhutang kepada MJF walaupun memperoleh jumlah RM67 juta dan mempunyai lebihan RM8 juta; (3) responden tidak berniat untuk menyebabkan pembayaran RM12.5 juta kepada perayu sekiranya Rayuan G 1622 ditolak dan perintah penggantungan dibatalkan, oleh yang demikian menimbulkan keperluan seorang pengurus kehakiman untuk menjaga kepentingan pemiutang secara khususnya pemohon sebagai satu-satunya pemiutang terbesar responden; (4) responden gagal untuk memberikan penjelasan mengapa kepentingan pemiutang tidak akan lebih terpelihara H dengan memilih untuk melalui proses penggulungan kerana pengurus kehakiman bertindak sebagai pihak ketiga yang bebas untuk memelihara kepentingan syarikat dan pemiutangnya; (5) kepentingan responden tidak akan terprejudis sekiranya saman pemula tersebut dibenarkan dan menentangnya menghalang pemohon daripada menikmati hasil litigasinya; I dan (6) mahkamah harus menimbangkan kepentingan pemiutang responden dan bukannya responden yang tiada kepentingan dalam syarikat. Isu untuk diputuskan adalah: (I) sama ada pemohon mempunyai locus standi untuk memulakan lampiran 1; (II) sama ada syarikat responden boleh atau tidak mampu untuk membayar hutangnya; dan (III) sama ada membuat perintah

tersebut berkebarangkalian tinggi akan mencapai satu atau lebih tujuan yang dinyatakan dalam s 405(1)(b) Akta Syarikat 2016. A

Diputuskan, menolak permohonan dengan kos:

(1) Pemohon berdasarkan Guaman 291 merupakan pemiutang responden kerana bukan sahaja responden mempunyai tuntutan kewangan terhadap responden tetapi responden mungkin atau boleh tertakluk kepada liabiliti kepada pemohon sekiranya penghakiman Guaman 291 dikekalkan dalam Rayuan 1622 dan oleh yang demikian pemohon mempunyai locus untuk membuat permohonan untuk pengurus kehakiman selaras dengan s 404 Akta Syarikat 2016 (lihat perenggan 25). B C

(2) Fakta bahawa responden mempunyai petisyen penggulungan difailkan terhadapnya merupakan keterangan prima facie bahawa responden tidak mampu untuk membayar hutangnya selaras dengan s 405(1)(a) Akta Syarikat 2016 (lihat perenggan 31). D

(3) Pengataan pemohon bahawa responden kononnya gagal untuk mengemukakan penyelesaian yang munasabah untuk isu yang dipersoalkan telah menolak beban untuk membuktikan mengapa perintah yang dipohon dalam lampiran 1 tidak sepatutnya diberikan. Ianya bukan tanggungjawab pemohon untuk memberikan penyelesaian kepada isu yang dibangkitkan. Lanjutan itu, walaupun responden digulungkan, ianya tidak menghalang pemohon untuk membuat tuntutan bahawa hutang yang dikatakan terhutang dalam proses penggulungan atau lebihan aset responden tidak boleh diuruskan oleh penyelesai dan bukannya pengurus kehakiman (lihat perenggan 33–34). E F

(4) Mahkamah juga mendapati bahawa pengataan yang mana responden berniat untuk syarikat tersebut digulung kerana responden memilih untuk tidak menyelesaikan yuran guaman yang terhutang kepada MJF walaupun menerima jumlah RM67 juta dan mempunyai lebihan RM8 juta tidak memenuhi mana-mana keperluan yang dinyatakan dalam s 405(1)(b) Akta Syarikat 2016 dan hanya keterangan bahawa responden tidak menyelesaikan hutangnya. Adalah untuk pemohon untuk membuktikan kepada mahkamah ini bahawa penyelesaian yang lebih memberi manfaat adalah melalui perintah pengurus kehakiman dan bukannya pengulungan, yang mana pemohon gagal untuk berbuat demikian (lihat perenggan 35). G H

(5) Pengataan bahawa responden tiada niat untuk membayar hutang dan oleh yang demikian keperluan pengurus kehakiman untuk memelihara kepentingan pemiutang diperbesarkan, bukan satu faktor yang boleh dipertimbangkan dibawah s 405(1)(b) Akta Syarikat 2016 kerana pengataan tersebut tidak meyokong atau merupakan keterangan apa-apa tujuan yang dinyatakan dipenuhi (lihat perenggan 36). I

(6) Isu pemohon dihalang daripada menikmati hasil litigasinya atau bahawa mahkamah perlu mengimbangkan kepentingan pemiutang bukan keterangan dan juga tidak memenuhi keberterusan syarikat atau keterangan bahawa ianya merupakan penyelesaian yang lebih membawa manfaat aset syarikat boleh dicapai selain daripada proses pengulungan (lihat perenggan 37).]

Cases referred to

AA Mutual International Insurance Co Ltd, Re [2004] EWHC 2430 (Ch), Ch D (folld)

Butterworth Products & Industries Sdn Bhd (Khaw Saw Mooi & Ors, petitioners), Re [1992] 1 MLJ 429, HC (folld)

CIMB Islamic Bank Bhd v Wellcom Communications (NS) Sdn Bhd & Anor [2019] MLJU 148; [2019] 4 CLJ 1, CA (refd)

Genesis Technologies International (S) Pte Ltd, Re [1994] 3 SLR 390, HC (refd)

Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit [2019] 8 MLJ 473, HC (refd)

People's Parkway Development Pte Ltd, Re [1992] 1 SLR 413, HC (folld)

Wan Soon Construction Pte Ltd, Re [2005] 3 SLR 375, HC (refd)

William Hockley Ltd, In re [1962] 1 WLR 555; [1962] 2 All ER 111, Ch D (refd)

Legislation referred to

Companies Act 2016 ss 404, 405, 405(1)(a), (1)(b), 410(c)

Mak Lin Kum (Mohd Faizal Izzul Faris with him) (Syed Ibrahim & Co) for the applicant.

Gavin Jay Anand Jayapal (Tanusha Ratnam and Santhyaa Venugopal with him) (Gavin Jayapal) for the respondents.

Justin Ong (Justin Faye & Partners) for the intervener.

Nadzarin Wok Nordin JC:

[1] There are before this court two applications, which are encls 1 and 14 with the former being an application by Spacious Glory Sdn Bhd ('applicant') for the appointment of a judicial manager known as En Mohd Afrizan ('proposed JM') to be appointed for the respondent, Coconut Three Sdn Bhd ('respondent') pursuant to ss 404 and 405 of the Companies Act 2016 (encl 1) and the latter an application by the same applicant and one Lau Tian Kiat (Lau) for leave to continue with its proceedings against the company pursuant to s 410(c) of the Companies Act 2016 (encl 14).

[2] The grounds for encl 1 are as follows:

(a) the applicant is a judgment creditor of the respondent for a sum of RM12.5m;

(b) by an announcement dated 14 February 2020, the respondent's holding company, Nexgram Holdings Sdn Bhd (NHB) announced that Messrs Justin Faye had presented a winding up petition (WU petition) against the respondent;

(c) it would be in the interest of the creditors of the respondent if a judicial management order is granted; and

(d) the creditors of the respondent would be better served if a judicial management order is granted.

[3] Whilst the grounds for encl 14 are as follows:

(a) there is a cross-appeal filed by the applicant and Lau against the respondent at the Court of Appeal vide Civil Appeal No W-02(NCC)(W)-1622–08 of 2018 (1622 Appeal);

(b) there is a counterclaim filed by the applicant and Lau against the respondent at the Kuala Lumpur High Court vide Suit No WA-22NCC-210–04 of 2019.

BACKGROUND

[4] The applicant had brought a claim against the respondent in the Kuala Lumpur High Court vide Suit No WA-22NCC-291–07 of 2017 (Suit 291) claiming a sum of RM12.5m pursuant to a share sale agreement between the applicant and the respondent and obtained judgment (Suit 291 judgment) upon conclusion of a full trial.

[5] The applicant is also the single largest unsecured creditor of the respondent.

[6] The respondent has appealed vide Appeal 1622 against the Suit 291 judgment.

[7] On 14 August 2018 an order for the stay of the Suit 291 judgment was granted ('stay order') to the respondent upon the undertaking that the respondent does not dispose or transfer its single largest asset, being a building registered under its name and having an address at Tower 7, Avenue 3, The Horizon, Fasa 1, Bangsar South, No 8 Jalan Kerinchi, 59200 Kuala Lumpur (Nexgram Tower) without the leave of the court pending the disposal of Appeal 1622.

A **[8]** On 14 December 2018, leave was granted to the respondent to dispose off Nexgram Tower to one Dato Idrus bin Mohd Satha (IMS) at a price of RM67m and the sum of RM12.5m to be segregated from the sale proceed to Messrs Haq & Associates Law Offices (HALO) the solicitors for the respondent (14 December 2018 order)

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[9] On or around 15 November 2019 a sum of RM12.5m was deposited with HALO pursuant to the 14 December 2018 order.

C **[10]** In February 2020, the respondent's former solicitors, Messrs Justin Faye (MJF), had filed a winding up petition alleging that there are outstanding legal fees to be paid by the respondent which was not disputed.

THE APPLICANT'S SUBMISSIONS

D **[11]** The applicant submits that the respondent has vigorously opposed encl 1 herein but has failed to provide a sensible solution for the issues in question and that it cannot be denied that the respondent has failed to appoint a solicitor to oppose the WU petition.

E

[12] The applicant further submits that as of to-date the respondent has chosen not to settle the legal fees owed to MJF despite having obtained the sum of RM67m and having a surplus of RM8m upon payment of the redemption sum and setting aside the RM12.5m. Thus the court should infer from the same that the respondent intends for the company to be wound up.

F

[13] It is contended by the applicant that since the respondent has taken the position that the applicant is not a creditor of the respondent, the respondent has no intention to cause the payment of RM12.5m to the applicant even if Appeal 1622 is dismissed and the stay order lifted and hence the conduct of the respondent amplifies the need for a judicial manager to safeguard the interest of the creditors particularly the applicant as the single largest creditor of the respondent.

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H **[14]** The applicant also submits that the respondent has failed to provide an explanation as to why the interest of the creditors would be better served by resorting to the winding up of the company as the judicial manager acts as an independent third party to safeguard the interest of the company and creditors.

I **[15]** It is also contended by the applicant that the interest of the respondent would not be prejudiced if the OS is granted as the respondent has completely disregarded the interest of creditors by opposing this application when there was no reason in doing so, and that the respondent was denying the applicant of its fruits of the litigation

[16] The applicant has also submitted that the court should weigh the interest of the creditors of the respondent as opposed to the respondent who has no genuine interest in the company

THE RESPONDENT'S SUBMISSIONS

[17] In respect of encl 1, the respondent contends that:

(a) the applicant does not have the requisite locus standi to initiate encl 1 since it is not a creditor of the respondent as Suit 291 judgment has been stayed;

(b) the applicant has utilised the judicial management for a corollary purpose to gain control over the respondent; and

(c) the proposed judicial managers are not fit and proper.

[18] The respondent further submits that it is actively negotiating to settle the legal fees owing to MJF.

[19] It is also contended by the respondent that the NHB had in its announcement on 14 February 2020 stated that the respondent had been served with the WU petition and intended to oppose it.

COURTS FINDINGS

[20] This court will firstly deal with encl 1 and subsequently rule on encl 14 should the court allow encl 1.

Issue of locus standi

[21] Under s 405 of the Companies Act 2016 any member or the board of directors, or a creditor, including any contingent or prospective creditor or all or any of those parties, together or separately, may make an application under s 404 as the said s 405 reads:

> (1) Where a company or its directors, under a resolution of its members or the board of directors, or a creditor, including any contingent or prospective creditor or all or any of those parties, together or separately, makes an application under section 404, the Court may make a judicial management order in relation to the company ...

[22] The stay order which can be found at exh LTK4 of the applicant's affidavit in support in encl 2 hereof, shows that the judgment has been stayed, the effect of which in this courts view is that there is technically no judgment obtained by the applicant against the respondent.

[23] Even though s 405 of the Companies Act 2016 or the said Companies Act 2016 itself does not define the term 'contingent or prospective creditor', I agree with the applicants solicitors and respectfully adopt that guidance maybe taken from the Singapore case of *Re People's Parkway Development Pte Ltd* [1992] 1 SLR 413 where LP Thean J following various cases in other jurisdictions had held 'The expression 'contingent or prospective creditor' has not been defined in the Act'. In the case of *In re William Hockley Ltd* [1962] 1 WLR 555 at p 558; [1962] 2 All ER 111, Pennycuick J expressed his view as follows:

> *The expression 'contingent creditor' is not defined in the Companies Act 1948, but must, I think, denote a person towards whom under an existing obligation, the company may or will become subject to a present liability on the happening of some future event or at some future date.* (Emphasis added.)
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> That definition was quoted (without any disapproval) by the High Court of Australia in the case of *Community Development Pty Ltd v Engwirda Construction Co* (1969) 120 CLR 455.

[24] This court is also of the view that the term 'creditor' in s 405 of the Companies Act 2016 must include all persons having any pecuniary claims against the respondent. I find authority for this in the case of *Re Butterworth Products & Industries Sdn Bhd (Khaw Saw Mooi & Ors, petitioners)* [1992] 1 MLJ 429 where Mohamed Dzaiddn J (as he then was) held:

> the term 'creditor' has been given the widest possible meaning by the court, and has been held to include all persons who have, or who will or may have, any pecuniary claim against the company, whether the claim is liquidated or not; and whether it is subject to a contingency or not (*Re Midland Coal Coke and Iron Co Craig's Claim* [1895] 1 Ch 267).

[25] Following from the same and the fact that the said s 405 refers to the term creditor to include any 'contingent or prospective creditor', I find that the applicant by virtue of Suit 291 is a creditor of the respondent as not only does the respondent have a pecuniary claim against the respondent but the respondent may or will become subject to a liability to the applicant if the Suit 291 judgment is affirmed in Appeal 1622 and accordingly for the purposes of the said s 404 of the Companies Act 2016, this court holds that the applicant does have the locus to apply for the application for a judicial manager pursuant to s 404 of the Companies Act 2016

Main issues in support of encl 1

[26] Section 404 of the Companies Act 2016 states:

> An application for an order that a company should be placed under a judicial management and for an appointment of a judicial manager may be made to the Court by the company or its creditor if the company or its creditor considers that:

(a) the company is or will be unable to pay its debts; and

(b) there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern or that otherwise the interests of creditors would be better served than by resorting to a winding up.

[27] This court will therefore pursuant to s 405 of the Companies Act 2016 have to consider whether the respondent company is or will be unable to pay its debts and it considers that the making of the order is likely to achieve one or more of the following purposes as stated in s 405(1)(b) of the Companies Act 2016 which are:

(a) the survival of the company or the whole or part of its undertaking as a going concern;

(b) the approval of a compromise or arrangement between the company and its creditors; and

(c) a more advantageous realisation of the company's assets would be effected than on a winding up.

[28] The term 'likely' has not been defined in the Companies Act 2016 but the term 'likely' has been held in the UK in the case of *Re AA Mutual International Insurance Co Ltd* [2004] EWHC 2430 (Ch) to mean the applicant to demonstrate on a balance of probabilities that it is 'more probable than not' that this criterion will be fulfilled. I respectfully adopt the same definition for the purposes of defining the term 'likely' under s 405 of the Companies Act 2016.

[29] In *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit* [2019] 8 MLJ 473, Wong Chee Lin JC (as she then was) had quoted Hansard in her grounds of judgment and stated that:

> [21] It is clear from the Hansard, that the judicial management was introduced to rehabilitate companies that are under financial distress and to reduce the number of cases where companies are wound up:
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> Datuk Liang Teck Meng (Simpang Renggam):
>
> minta Menteri Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan menyatakan berapakah jumlah kes syarikat yang digulungkan sepanjang tempoh 2010 hingga 2014 dan apakah peranan kerajaan dalam menangani kes syarikat yang digulungkan?
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> *Timbalan Menteri Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan (Dato' Paduka Ahmad Bashah bin Md Hanipah)*: ...
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> ... Jumlah syarikat yang digulungkan sepanjang tempoh 2010 hingga bulan Ogos 2014 adalah sebanyak 9,010. Dari jumlah tersebut sebanyak 3,396

> syarikat telah digulungkan secara sukarela manakala sebanyak 5,614 syarikat telah digulungkan melalui perintah mahkamah. Kementerian Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan prihatin berhubung keperluan memperkenalkan satu mekanisme untuk menyelamatkan syarikat-syarikat yang mengalami masalah kewangan. Namun masih boleh dipulihkan untuk beroperasi secara sedia kala.
>
> Dalam hal ini, Suruhanjaya Syarikat Malaysia yang merupakan agensi kementerian ini telah mengambil inisiatif untuk memperkenalkan beberapa mekanisme penyelamat korporat melalui pembaharuan yang sedang dilakukan kepada Akta Syarikat 1965. Mekanisme yang dicadangkan ini akan menjadi satu alternative kepada penggulungan atau pembubaran syarikat. Antaranya ialah pengurusan kehakiman ...

[30] Taking Parliament's intention and the criteria's mentioned in the said s 405 of the Companies Act 2016, this court will now examine each of the components referred to in the said section.

[31] As to whether the respondent company is or will be unable to pay its debts, the fact that the respondent has the WU petition filed against it, is in this courts view prima facie evidence of the same, and thus this court is satisfied that the respondent has been shown to be unable to pay its debt in accordance with s 405(1)(a) of the Companies Act 2016.

[32] This court will now consider whether the making of the order is likely to achieve one or more of the following purposes stated in s 405(1)(b) of the Companies Act 2016. In coming to my decision on the same, the burden of proving the fulfillment of the said purposes is upon the applicant who has to convince this court that the making of the order as prayed for under encl 1 is likely to achieve one or more of the purposes as stated in s 405(1)(b) of the Companies Act 2016. It has been said in the Court of Appeal case of *CIMB Islamic Bank Bhd v Wellcom Communications (NS) Sdn Bhd & Anor* [2019] MLJU 148; [2019] 4 CLJ 1, that:

> [9] The effect of making a judicial management order in relation to an insolvent company which may have no prospect of recovering money or assets within a reasonable time indeed may be very drastic. Thus, the court's consideration at all stages, that is to say from the date the application is filed and from the date of the order, if any is given, must be based on strict proof and evidence and not merely surmise and conjecture ...

[33] I have thus considered the applicants contention that the respondent has allegedly failed to provide a sensible solution for the issues in question and consequently that it cannot be denied that the respondent has failed to appoint a solicitor to oppose the WU petition. I find from this contention that the

applicant has pushed the burden of proving why the orders prayed for under encl 1 should not be given, instead of the applicant itself having to prove to this court that any one or more of the purposes as stated in s 405(1)(b) of the Companies Act 2016 has been fulfilled. It is not the duty nor the obligation of the respondent herein in opposing encl 1 to provide such a solution to the issues in question, but, at the risk of repeating myself, the burden of proof is on the applicant to show why encl 1 should be granted premised on any one or more of the matters set out in s 405(1)(b) of the Companies Act 2016. In any event as can be seen in exh CT8 of encl 9, which is the respondents affidavit in reply, NHB had in its announcement on 14 February 2020 stated that the respondent had been served with the WU petition and intended to oppose it as per para d therein.

[34] In this respect I am also of the opinion that even if the respondent company was wound up, there is no bar to the applicant making a claim for the alleged debt owed to them in the winding up process or that the respondent's assets which would include the RM8m surplus cannot be dealt with by the liquidator in the winding up instead of a judicial manager, and thus on this point the applicant has not shown, to this court, based on the evidence before it, that a more advantageous realisation of the company's assets would be effected than on a winding up of the respondent.

[35] I also find that that the allegation that the respondent intends for the company to be wound up as the respondent has chosen not to settle the legal fees owed to MJF despite having obtained the sum of RM67m and having a surplus of RM8m, does not in my view satisfy any of the purposes mentioned in s 405(1)(b) of the Companies Act 2016 but is only evidence of the respondent not settling its debts. It is for the applicant prove to this court that a more advantageous realisation of the company's assets would be effected than on a winding up and not the issue of whether the in my view wholly immaterial. In an application for judicial management which is premised, inter alia, on the ground that a judicial management order would be more advantageous than a winding up against the respondent, as in this case, it is incumbent upon the applicant to show to this court that a more advantageous realisation of the company's assets would be effected in a judicial management order than on a winding up, which I find that the applicant herein has failed to do.

[36] As to allegation that the respondent has no intention to cause the payment of RM12.5m to the applicant and hence the conduct of the respondent amplifies the need for a judicial manager to safeguard the interest of the creditors particularly the applicant as the single largest creditor of the respondent, I hold again that this is not a factor to be considered under s 405(1)(b) of the Companies Act 2016 and the said allegation does not

promote or is evidence of any of the purposes mentioned therein being fulfilled.

[37] I also with respect find that the issue of the applicant being deprived of its fruits of the litigation or that the court should weigh the interest of the creditors of the respondent as opposed to the respondent who has no genuine interest in the company is not evidence nor the fulfillment of the survival of the company or the whole or part of its undertaking as a going concern, or evidence that a more advantageous realisation of the company's assets would be effected than on a winding up.

[38] In summary, this court has found:

(a) no evidence placed before this court by the applicant to support any of the purposes referred to in s 405(1)(b) of the Companies Act 2016 and that the applicant has failed to demonstrate on a balance of probabilities that it is likely ie 'more probable than not' that these criterions will be fulfilled;

(b) from the lack of evidence before this court, that there is no real prospect or possibility to achieve one or more of the purposes set out in s 405(1)(b) of the Companies Act 2016;

(c) the mere assertions that the respondent should be placed under judicial management under s 404 of the Companies Act 2016 without any credible evidence supporting the same and merely playing lip service by repeating the words in s 405(1)(b) of the Companies Act 2016 in the application for judicial management is insufficient for the court to make any consideration in support of a judicial management application. I wish to quote *Re Wan Soon Construction Pte Ltd* [2005] 3 SLR 375 where it was stated by the Singapore High Court that the 'Court is not mere rubber stamp in as much as it will accede to any every request to order such other sections or provisions to apply almost, or even wholly, as a matter of course' as well as the Singapore case of *Re Genesis Technologies International (S) Pte Ltd* [1994] 3 SLR 390 where the court held that a mere allegation of belief that the purposes of the judicial management would be satisfied without any substantiation would be insufficient to discharge its burden;

(d) the application before me does not appear to this court to be honourable as the crux of encl 1 is premised on the applicant's position as the largest single creditor of the respondent which in my view does not necessarily take into account the view of the other creditors of the respondent which this court should also take into account in determining whether a judicial manager should be appointed so as to enable any one or more of

the purposes under s 405(1)(b) of the Companies Act 2016 to be achieved; and

(e) the applicant has thus fallen short of proving to this court that any one or more of the purposes under s 405(1)(b) of the Companies Act 2016 can be achieved.

[39] This court hereby finds in the circumstances of this matter that there is no need to appoint a judicial manager and thus the issue of whether the proposed JM is fit and proper to be appointed the judicial manager under encl 1 will not be addressed by this court. Whereby this court is dismissing encl 1 with costs. Accordingly, encl 14 is now academic and is hereby also dismissed with costs.

Applications dismissed with costs.

Reported by Izzat Fauzan